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No. 98-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

U-HAUL CO. OF CLEVELAND,
Petitioner,

v.

LEE KUNKLE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents the same two questions on which the Court granted certiorari in *Cleveland* v. *Policy Management Systems Corp.*, No. 97-1008:

1. Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that he is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.*

2. If it does not create such a presumption, what weight, if any should be given to the application for, or receipt of, disability insurance benefits when a person asserts he is a "qualified individual with a disability" under ADA?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner U-Haul Co. of Cleveland, a defendant in the District Court and appellant in the United States Court of Appeals for the Sixth Circuit, is a wholly owned subsidiary of U-Haul International, which is in turn a wholly owned subsidiary of AMERCO. Petitioner has no non-wholly owned subsidiaries.

Respondent Lee Kunkle was plaintiff in the District Court and appellee in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner U-Haul Co. of Cleveland ("U-Haul") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court denying U-Haul's post-trial motions is unreported and reproduced at App. 21a. The opinion of the District Court on U-Haul's motion for summary judgment is unreported and reproduced at App. 13a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1998. App. 1a. A timely petition for

rehearing with suggestion for rehearing en banc was denied on November 24, 1998. App. 37a. The jurisdiction of the District Court was based on 28 U.S.C. §§ 1331, 1343, and 1367, *see* App. 13a, and the jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of 42 U.S.C. §§ 423(d)(1)(A), 423 (d)(2)(A), 12102(2), 12111(8), and 12112(a) are reproduced in Appendix H, beginning at App. 39a.

INTRODUCTION

In successfully seeking disability benefits under the Social Security Act and from a private insurance company, respondent Lee Kunkle ("Kunkle") represented that he was totally disabled from employment. Thereafter, however, Kunkle filed suit claiming that he was qualified to perform the duties of his job at U-Haul and had been discharged in violation of the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.* The courts below rejected U-Haul's claims that Kunkle was judicially estopped from pursuing his ADA action as a result of his earlier claims of total disability and his continuing receipt of disability insurance benefits.

The question presented in this case—the effect on ADA litigation of earlier claims of total disability in seeking insurance benefits—is currently pending before this Court. In *Cleveland* v. *Policy Management Systems Corp.*, No. 97-1008, the Court granted certiorari to resolve the disarray in the courts of appeals over the appropriate impact of an employee's application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, on the employee's suit alleging a violation of the ADA. Because this case presents the same issues the

Court will consider in *Cleveland*, and will likely be resolved by this Court's decision in that case, the Court should defer consideration of this petition until it issues its decision in *Cleveland*, and then dispose of this petition as appropriate in light of that decision.

STATEMENT OF THE CASE

In January 1994, respondent Kunkle was Shop Manager of U-Haul's repair shop in Akron, Ohio, when he was diagnosed with lung cancer. App. 2a. Kunkle had surgery to remove his left lung on February 11, 1994, and it was expected that he would miss six weeks of work. App. 2a, 14a, 23a. On February 24, 1994, Kunkle's wife applied on his behalf for disability benefits under a private insurance policy that conditioned benefits on a finding that the policyholder was unable to perform "every duty of [his] occupation." Def. Ex. J; Ct. App. J.A. at 1094. In the application, Kunkle's surgeon certified that he was "totally disabled" as of February 7, 1994. App. 2a. The application was granted and Kunkle started receiving payments in March 1994. App. 2a.

Kunkle's recovery from surgery did not go as smoothly as hoped. After his surgery, Kunkle lapsed into a life-threatening coma and remained on a respirator for the next eight weeks. App. 14a. As the District Court explained, Kunkle "was diagnosed with adult respiratory distress syndrome and had only a 5% chance of survival." App. 23a. Nevertheless, Kunkle emerged from his coma and was eventually discharged from the hospital in late May 1994. App. 3a, 23a. "He * * * remained in serious condition. He was bedridden, required supplemental oxygen, breathed through a trachea tube, and ate through a stomach tube." App. 3a. "[H]e had lost more than sixty pounds." App. 23a.

Three months into Kunkle's absence from work, and while his physical condition was still quite grave, U-Haul was compelled to take steps to fill his position at the

Akron facility. Kunkle's position as Shop Manager was filled by Terry Mislevy, who had eighteen years of experience with U-Haul, and a mechanic in the shop was named to the new position of Shop Foreman to assist Mislevy. App. 23a.

Kunkle applied for disability insurance benefits with the Social Security Administration at about this same time, on May 21, 1994. App. 2a. In support of his application, he stated that he " 'became unable to work because of [his] disabling condition on February 11, 1994.' " App. 2a. The application was granted in July 1994 and Kunkle began receiving monthly disability benefits of $1088 in August of that year. App. 2a, 14a. Also in August 1994, Kunkle was diagnosed with inoperable cancer in his left chest wall, and underwent "a two-month regimen of outpatient radiation and an intensive three-month cardio-rehabilitative program." App. 3a.

In January 1995—eleven months after he initially left U-Haul for what was expected to be a six week absence—Kunkle informed his supervisor, U-Haul President J.P. White, that he was ready to return to work. At a meeting one week later with White and Mislevy, Kunkle was offered the chance to return to U-Haul as Shop Manager in its Cleveland facility, but said he was not interested because he did not want to commute to Cleveland. App. 3a-4a. Kunkle therefore was named Shop Foreman at the Akron facility, returning to work on February 1995 at the same salary he had received as Shop Manager before his year-long absence. App. 4a. He continued to receive Social Security disability benefits despite his return to employment with U-Haul. App. 4a.

The job of Shop Foreman to which Kunkle had returned was more physically demanding than the Shop Manager position he previously held, and which he had declined when it was offered to him in January 1995. Kunkle had difficulty performing some of the physical tasks associated with his new position, particularly requiring assistance

when operating the shop's battery changing station. App. 4a-5a, 24a. In addition, "Kunkle experienced difficulty breathing and occasionally went to his truck to retrieve oxygen." App. 9a. White discharged Kunkle on March 20, 1995, telling Kunkle that he was "not physically capable of doing th[e] job." App. 5a.

Kunkle filed this action in August 1995, alleging, *inter alia*, a violation of the ADA. U-Haul moved for summary judgment, asserting that "Kunkle cannot prevail on his claim because, by receiving Social Security benefits while he returned to work, he is estopped from asserting that he was qualified to perform his work." App. 17a. The District Court rejected this argument, stating without more that "representations by a plaintiff that he is entitled to disability benefits [are] not dispositive of whether he is not qualified to work." App. 17a (citing *Overton* v. *Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992); *Morton* v. *GTE North, Inc.*, 922 F. Supp. 1169 (N.D. Tex. 1996), *aff'd*, 114 F.3d 1182 (5th Cir.), *cert. denied*, 118 S. Ct. 205 (1997)).

After trial, a jury returned a verdict against U-Haul in the amount of $950,000. U-Haul filed a motion for judgment as a matter of law, asserting as the "primary basis" for that motion its argument that "Kunkle is estopped from being a 'qualified individual with a disability' by statements that he and his physician made to the Social Security Administration and his private insurance carrier." App. 25a. The District Court again rejected U-Haul's estoppel argument. App. 25a-26a.

U-Haul appealed to the Sixth Circuit, and again raised its argument that Kunkle was judicially estopped from claiming to be a qualified individual in light of his earlier claims of total disability and his continued receipt of disability benefits. While the case was on appeal, the Sixth Circuit issued its decisions in *Blanton* v. *Inco Alloys Int'l, Inc.*, 123 F.3d 916 (6th Cir. 1997), *supplementing* 108 F.3d 104 (6th Cir. 1997), and *Griffith* v. *Wal-Mart Stores,*

Inc., 135 F.3d 376 (6th Cir. 1998), *pet. for cert. filed*, 66 U.S.L.W. 3800 (U.S. June 9, 1998) (No. 97-1991). In *Blanton*, the Court of Appeals noted its agreement with the D.C. Circuit's decision in *Swanks* v. *Washington Metropolitan Area Transit Auth.*, 116 F.3d 582 (D.C. Cir. 1997), which it viewed as holding that "the receipt of disability benefits does not preclude subsequent ADA relief," and "reject[ing] the doctrine of judicial estoppel, but * * * allow[ing] the consideration of prior sworn statements by the parties as a material factor." 123 F.3d at 917. *Griffith* reiterated that, under *Blanton*, "statements made in an application for Social Security disability benefits, while relevant, do not result in judicial estoppel." 135 F.3d at 382. Instead, the court held, such statements should be "analyzed under traditional summary judgment principles." *Id.* at 383.

Thus, by the time this case was argued in the Sixth Circuit, that court had squarely rejected U-Haul's claim that Kunkle's action was barred by judicial estoppel, and U-Haul recognized at oral argument that Sixth Circuit case law was now against this position. Based on this "concession," the Sixth Circuit found that it "need not address the merits of U-Haul's argument that Kunkle should be judicially estopped from asserting that he is 'otherwise qualified' within the meaning of the ADA." App. 11a. The court did not address U-Haul's argument that, under *Blanton* and *Griffith*, Kunkle's statements concerning his disability were nonetheless pertinent to U-Haul's claim that it was entitled to judgment as a matter of law.

U-Haul's timely petition for rehearing with suggestion for rehearing en banc was denied on November 24, 1998. App. 37a.

REASONS FOR GRANTING THE WRIT

There is no dispute that the issue involved in this case is the subject of substantial conflict among the courts of appeals. As the Solicitor General said in response to this Court's invitation to provide the views of the United

States on the petition in *Cleveland*, "[t]he courts of appeals are in considerable disarray over the impact that an employee's application for or receipt of Social Security disability benefits should have on the employee's claim under the ADA." Brief for the United States as Amicus Curiae at 7-8, *Cleveland* v. *Policy Management Systems Corp.*, No. 97-1008 (filed July 1998).[1] The Solicitor General noted the existence of at least four different views in the courts of appeals on this issue, *id.* at 8-10, and urged the Court to grant the petition. *Id.* at 7. The Court did just that. The case is now being briefed and has been set for argument on February 24, 1999.

The conflict that will be resolved in *Cleveland* is squarely presented in this case. At each step of the proceedings below, U-Haul asserted that Kunkle was judicially estopped from pursuing his ADA action by the claims of total disability he made when successfully pursuing disability insurance benefits. *See, e.g.*, App. 10a-11a; 17a; 25-26a. U-Haul also claimed that, even if judicial estoppel did not operate as a *per se* bar to Kunkle's action, Kunkle's assertions that he was totally disabled demonstrated U-Haul's entitlement to judgment as a matter of law. *See, e.g.*, Final Brief of Defendant-Appellant at 18-22; Final Reply Brief of Defendant-Appellant at 2-3.[2] While there may be some confusion in the Sixth

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[1] *See, e.g., Rascon* v. *US West Communications, Inc.*, 143 F.3d 1324, 1330-32 (10th Cir. 1998) (recognizing "varying views of other circuits" on ADA judicial estoppel question).

[2] *See also* Final Brief of Defendant-Appellant at 22 ("Regardless of whether one applies the rule that a totally disabled plaintiff is precluded from bringing an ADA claim because as a matter of law he is not a 'qualified individual' or instead applies the rule that representations of disability are merely 'material factors,' it is illogical and inconsistent with all the authorities cited * * * to permit the plaintiff in this case to prevail on these facts."); Petition of U-Haul Co. of Cleveland for Rehearing and Suggestion for Rehearing En Banc ("Reh. Pet.") at 6 (arguing that, while *per se*

Circuit's cases about the weight to be given such claims of disability,[3] there can be no dispute that U-Haul has consistently maintained that Kunkle's admissions—even if not controlling—were entitled to some weight.

It is also clear that the outcome of this case is likely to be affected by the Court's disposition of *Cleveland*. The respondent in *Cleveland* has defended the Fifth Circuit's holding that "the application for or the receipt of social security disability benefits creates a *rebuttable* presumption that the claimant or recipient is judicially estopped from asserting that he is a 'qualified individual with a disability.'" *Cleveland* v. *Policy Management Systems Corp.*, 120 F.3d 513, 518 (5th Cir. 1997) (emphasis in original). *See, e.g.*, Brief in Opposition at 7-8, *Cleveland* v. *Policy Management Systems Corp.*, No. 97-1008. Petitioner in *Cleveland*, along with the United States and EEOC as amici curiae, have argued against a rebuttable presumption, but recognize that statements concerning disability may be considered as evidence in a subsequent ADA action.[4]

No matter which of these views—or some other view—is adopted in *Cleveland*, the Sixth Circuit's decision will likely have to be reconsidered in light of this Court's guidance on the question. The Sixth Circuit's opinion below rejected application of a *per se* rule of judicial estoppel,

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judicial estoppel was foreclosed by prior Sixth Circuit decisions, "[t]he trial court, and the panel, should * * * have granted U-Haul judgment as a matter of law based upon plaintiff's continued claims of total disability").

[3] *See* Reh. Pet. at 7-8 (discussing various standards articulated in *Blanton*, *Griffith*, and *Keever* v. *City of Middletown*, 145 F.3d 809, 813 (6th Cir.), *cert. denied*, 119 S. Ct. 407 (1998)).

[4] Brief for Petitioner at 18, *Cleveland* v. *Policy Management Systems Corp.*, No. 97-1008; Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner at 6, *Cleveland* v. *Policy Management Systems Corp.*, No. 97-1008.

and—although it did not expressly address the evidentiary effect on an ADA action of prior statements of disability—rejected U-Haul's argument that giving such statements appropriate evidentiary weight required judgment in U-Haul's favor as a matter of law. Once this Court has established the proper evidentiary effect of such statements in *Cleveland*, the Court should dispose of the petition in this case by granting the petition, vacating the decision below, and remanding the case for further consideration in light of the Court's opinion in *Cleveland*.

In the meantime, the Court should defer consideration of this petition. That appears to be the course the Court is following with respect to other petitions that also present the questions at issue in *Cleveland*.[5]

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[5] *See, e.g., Griffith, supra* (cert. petition filed June 9, 1998); *Moore* v. *Payless Shoe Source, Inc.*, 139 F.3d 1210 (8th Cir. 1998), *pet. for cert. filed* (U.S. July 20, 1998) (No. 98-5286). *See also Ross* v. *Indiana State Teacher's Ass'n Ins. Trust*, 159 F.3d 1001 (7th Cir. 1998), *pet. for cert. filed*, 67 U.S.L.W. 3394 (U.S. Dec. 2, 1998) (No. 98-912); *Aldrich* v. *Boeing Co.*, 146 F.3d 1265 (10th Cir. 1998), *pet. for cert. filed*, 67 U.S.L.W. 3376 (U.S. Nov. 23, 1998) (No. 98-859).

CONCLUSION

For the foregoing reasons, this Court should defer consideration of this petition until it issues its decision in *Cleveland* v. *Policy Management Systems Corp.*, and then dispose of this petition as appropriate in light of that decision.

Respectfully submitted,

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